No. 87-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD L. DUGGER, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

AUBREY DENNIS ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICI CURIAE*

Amici curiae have obtained the written consent of the parties to file this brief, as indicated by the consent letters previously filed with the Court.

The National Legal Aid and Defender Association (NLADA) is a non-profit national organization with membership of approximately 4,700 attorneys and organizations. NLADA's primary purpose is to assist in

providing effective legal services to persons unable to retain counsel in criminal and civil proceedings. Attorneys and organizations affiliated with NLADA represent condemned inmates in states throughout the United States.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a nation-wide membership of over 4,000 lawyers. It is concerned with the protection of individual rights and the improvement of criminal law practice and procedures. Attorneys affiliated with NACDL represent death row inmates in states throughout the country.

The American Civil Liberties Union of Florida is an affiliate of the national American Civil Liberties Union (ACLU). The ACLU is a non-profit organization dedicated to the preservation of the Bill of Rights throughout the United States. Florida ACLU attorneys represent death row inmates throughout the State of Florida.

SUMMARY OF ARGUMENT

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court held that a petitioner's failure to comply with certain kinds of state procedural rules would prevent her from raising claims in federal habeas absent a showing of cause for and actual prejudice resulting from the default. The State argues that under the procedural default principles of *Sykes*, Mr. Adams' constitutional claim is barred from federal habeas corpus review based on a Florida procedural rule that prevents Florida courts from hearing collaterally matters that were not raised but which could have been raised on direct appeal.[1] Brief of the Petitioners at 28-43 & n.7. A state rule is a valid procedural bar only if it is an adequate and independent state ground. The Florida rule in question here fails to

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[1] Florida's "raised or could have been on direct appeal" rule is a doctrine of common law origins. *E.g., McCrae v. State*, 437 So.2d 1388, 1390 (Fla. 1983).

satisfy this essential condition in two respects: It is discretionary, and it is applied arbitrarily to capital sentencing issues.

ARGUMENT

The state rule of procedure at issue here is a discretionary and haphazardly applied state procedural rule. As such, it is entitled to no deference under *Wainwright v. Sykes*. The enforceability of such a default rule is a question that has not before been addressed by the Court in the post-*Furman* era of capital punishment.

The Court in *Smith v. Murray*, 106 S. Ct. 2661 (1986), rejected the broad notion that procedural default can never bar federal habeas corpus review in a capital case. State death-sentenced prisoner and federal habeas petitioner Michael Marnell Smith urged the Court, in a Reply Brief footnote, to accept the reasoning of "many commentators [who] have taken the position that procedural defaults in state courts should not bar federal review of any claim that would invalidate a death sentence, at least in the absence of a showing that the petitioner himself deliberately bypassed the state processes." Reply Brief of Petitioner at 7 n.8, *Smith v. Murray*, 106 S. Ct. 2661 (1986) (citing Batey, *Federal Habeas Corpus Relief and the Death Penalty: Finality with a Capital "F,"* 36 U. Fla. L. Rev. 252 (1984); Catz, *Federal Habeas Corpus and The Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C.Davis L. Rev. 1177 (1985)).

Justice O'Connor, writing for herself and four other Justices, held that Smith had forfeited his federal claim because he did not assign it as error in his direct appeal to the Virginia Supreme Court. The Court, for the first time in a fully briefed and argued case since the modern resumption of capital punishment, explicitly "reject[ed] the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal

laws." 106 S. Ct. at 2668. Justice Stevens, in a dissent joined by three other Justices, argued that the majority failed "to give appropriate weight to the fact that capital punishment is at stake in this case." *Id.* at 2672.

Although a majority of the Court in *Smith* rejected the broad notion that procedural default can never bar federal review in a capital case, *Smith* did not present the question raised by the procedural rule invoked by the State of Florida in Mr. Adams' case. The Virginia rule at issue in *Smith* was absolute and nondiscretionary;[2] therefore the case in no way presented or resolved—even *sub silentio*—the applicability of a discretionary or haphazardly applied default rule to bar federal claims of condemned inmates.

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[2] Rules 5:17 and 5:25 of the Virginia Rules of Court provide that "only errors assigned in the petition for appeal will be noticed by this court and no error not so assigned will be admitted as a ground for reversal of a decision below." This default rule is on its face uncompromising, unlike Virginia's *trial level* default rule—found in the same Virginia Rules of Court—which permits appellate review of error not objected to at trial "for good cause shown or to enable this court to attain the ends of justice."

These rules appear to be absolute in capital cases. *E.g., Quintana v. Commonwealth*, 295 S.E.2d 643 (Va. 1982); *Coppola v. Warden*, 282 S.E.2d 10 (Va. 1981). The capital statute does require the Virginia Supreme Court to consider and determine two matters even if not enumerated on appeal: (1) whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor," and (2) whether the sentence of death is "excessive or disproportionate." Va. Code § 17-110.1C (1950 & Repl. Vol. 1982). However, *sua sponte* review seems limited to these two issues. *Fitzgerald v. Commonwealth*, 292 S.E.2d 798 (Va. 1982). We found no capital case in which the Virginia Supreme Court forgave an appellate level procedural default.

I. IN ORDER TO CONSTITUTE A VALID PROCEDURAL BAR UNDER *WAINWRIGHT v. SYKES*, THE PROCEDURAL RULE MUST BE AN ADEQUATE AND INDEPENDENT STATE GROUND

The *Sykes* Court framed the question presented in this way: "In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?" 433 U.S. at 78-79.[3] The Court reasoned that "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts" and that the "application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law." *Id.* at 81 (emphasis in original). By contrast, the "area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its procedural rules." *Id.* at 81-82.

Following discussion of the state procedural default at issue and after noting that "all of the Florida appellate courts refused to review petitioner's federal claim on the merits," 433 U.S. at 85, the *Sykes* Court concluded that the failure to object at trial to the admission of the confession in that case "amounted to an independent and adequate state procedural ground which would have prevented direct review here." *Id.* at 87. Thus, for the *Sykes* Court, the adequate and independent state ground issue was treated as a preliminary inquiry, to be resolved by reference to the Court's direct review cases.

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[3] The habeas consequences of the adequate and independent state ground doctrine is also an issue before the Court in *Harris v. Reed*, No. 87-5677. *See* Brief of the National Legal Aid and Defender Association as *Amicus Curiae* in Support of Petitioner, *Harris v. Reed*, No. 87-5677.

The Courts of Appeal have followed *Sykes*' direction and have treated the adequate and independent state ground doctrine as a condition precedent to the cause-and-prejudice inquiry, taking guidance from this Court's direct review cases in making this preliminary determination. *See Spencer v. Kemp*, 781 F.2d 1458, 1463, 1470 & n.21 (11th Cir. 1986) (en banc) (noting that "if a state possesses an independent and adequate procedural rule," failure to abide by that rule will ordinarily preclude consideration in habeas absent cause-and-prejudice, and reasoning that, in making the threshold determination, the court would be "guided by a series of decisions of the Supreme Court suggesting bases on which an asserted state procedural ground will not be considered independent and adequate for purposes of insulating the state court's rejection of federal claims from federal review"); *Oliver v. Wainwright*, 795 F.2d 1524, 1529 (11th Cir. 1986) (reasoning that "[e]ven were *Sykes* to apply, we could not defer to the state court's rejection of Oliver's constitutional claim unless it were based on an 'independent and adequate' state ground"); *Francois v. Wainwright*, 741 F.2d 1275, 1281 (11th Cir. 1984) (a "federal court should not defer to a state interpretation of a state procedural rule that results in forfeiture of a federal claim unless the state rule and its interpretation are 'independent and adequate'"); *Wheat v. Thigpen*, 793 F.2d 621, 624 (5th Cir. 1986) (refusing to apply cause-and-prejudice tests because no "independent and adequate state grounds exist to prevent federal review," and interpreting *Sykes* as having "specifically held that a federal court may not review a habeas petitioner's federal claims when the state courts have declined to pass on the claims because of an independent and adequate state procedural ground, absent a showing of cause and prejudice"); *Breest v. Perrin*, 655 F.2d 1, 2 n.1 (1st Cir. 1981) (calling the adequacy and independence inquiry "an issue that must be considered before deciding the effect of *Wainwright v. Sykes*"); *Phillips v. Smith*, 717

F.2d 44, 49 (2nd Cir. 1983) (noting that "if the state court relied on an adequate and independent state procedural ground, federal habeas review is unavailable absent a showing of cause and prejudice"); Goodman & Sallet, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hastings L.J. 1683, 1690-92 (1979) (adequacy and independence are preliminary inquiries); Note, *Applying Wainwright v. Sykes to State Alternative Holdings and Summary Affirmances*, 53 Fordham L. Rev. 1357, 1364-65 & n.41 (1985) (adequacy of state procedural ground is a federal question which federal habeas court has jurisdiction to decide); Note, *On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings*, 83 Mich. L. Rev. 1393, 1416 n.102 (1985) (adequacy for habeas purposes is closely analogous to adequacy for direct review purposes).

II. IN A CAPITAL CASE, A STATE'S INVOCATION OF A DISCRETIONARY STATE PROCEDURAL BAR IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND

In a capital case, the application of a discretionary state procedural rule constitutes an *inadequate* state ground.

In *Williams v. Georgia*, 349 U.S. 375 (1955), the petitioner, a condemned state prisoner, claimed and the state conceded that the method of selecting the grand jury in his case discriminated on the basis of race. The state court had denied the grand jury challenge on procedural grounds as untimely, even though a state statute gave the court the discretion to entertain the challenge. Justice Frankfurter, writing for the Court, held that the Court had jurisdiction because "*the discretionary decision to deny the motion [for consideration of the federal claim] does not deprive this court of jurisdiction to find that the substantive issue is properly before us.*" *Id.* at 389 (emphasis added). *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 233-34 (1969) (a procedural rule "more

properly deemed discretionary than jurisdictional" does not bar federal review).

It is no accident that *Williams v. Georgia* was a capital case. Justice Frankfurter's idea in *Williams* was that a state court's refusal to exercise discretion to reach the merits of a condemned inmate's constitutional claim was an "act so arbitrary and so cruel . . ., *considering that life is at stake,*" that it constituted a "denial of due process in its rudimentary procedural aspect." *Daniels v. Allen*, 344 U.S. 443, 557-58 (1953) (Frankfurter, J., dissenting) (emphasis added).

The necessity of bridling discretion "considering that life is at stake" has special resonance given the Court's modern death penalty jurisprudence. Unbridled discretion in capital cases obtains constitutional stature; it is the type of discretion which led the Court in *Furman v. Georgia*, 408 U.S. 238 (1972), to invalidate the death penalty as then administered. The Court noted in *Zant v. Stephens* that "[a] fair statement of the consensus expressed by the Court in *Furman* is that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874 (1983). "Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 108 S.Ct. ——, No. 87-519, slip op. at 5 (U.S. June 6, 1988). *See also Gardner v. Florida*, 430 U.S. 349, 361 (1977) (noting that a practice which injected inconsistency into the procedure for appellate review of the factual bases for death sentences would render the "Florida capital-sentencing procedure . . . subject to the defects which resulted in the holding of unconstitutionality in *Furman*").

At a minimum, *Williams* forbids federal deference to the state courts' exercise of a particular type of discretion in refusing to decide the merits of issues in capital cases: ad hoc, unprincipled discretion that is in a very real sense lawless. Distinguishing permissible guided discretion from ad hoc discretion can be difficult. As Daniel Meltzer has argued, state judges cannot realistically be expected to provide reasoned explanations refuting a possible finding of ad hoc discretion for every issue in every case. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1140-41 (1986). The institutional difficulties of ascertaining whether specific decisions result from ad hoc discretion or from principled discretion led Meltzer to place the burden of proof upon the person whose claim has been forfeited. *Id* at 1141. Meltzer, however, would reverse the burden in capital cases: "[W]hen state courts have broad discretion to excuse procedural defaults in capital cases, it seems appropriate to shift the burden of persuasion on the question of whether such discretion was exercised in an ad hoc or a principled manner; in view of the stakes involved, the burden should rest on the state, not the defendant." *Id.* at 1122.

A state's invocation of a purely discretionary procedural default rule should not operate to bar habeas review in a capital case. *Amici* therefore advocate not only a shifting of the burden to the State concerning disproving ad hoc discretion, but a per se rule that a state's discretionary decision to procedurally bar the federal claim of a condemned person is not adequate. Such a rule recognizes that the insulation provided by the Court's decisions in the capital sentencing context is also necessary in the state appellate process reviewing death sentences, in view of the powerful forces which can influence discretion.

III. A HAPHAZARDLY APPLIED STATE PROCEDURAL BAR IS NOT AN ADEQUATE AND INDEPENDENT STATE GROUND

The rule that state courts cannot avoid federal review by resting a denial of a federal claim upon the erratic and arbitrary invocation of a state procedural bar is long and firmly settled. Justice Holmes in 1923 described the rule as "general and necessary" because "[i]f the Constitution and laws of the United States are to be enforced," the federal courts are obliged "to see that local practice shall not be allowed to put unreasonable obstacles in the way." *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). *See also Love v. Griffith*, 266 U.S. 32, 33-34 (1924); *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455-58 (1958).

The arbitrariness principle was reaffirmed in *Barr v. City of Columbia*, 378 U.S. 146 (1964), which involved a breach-of-peace conviction. The state courts had refused to consider the merits of the federal claims, holding that the exceptions that were taken were insufficiently specific. This Court noted that the state courts had previously considered the merits of claims raised by identical exceptions, and for this reason concluded that a procedural rule that is not "strictly or regularly followed cannot deprive us of the right to review." *Id* at 149. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the Court held a procedural default rule inadequate, stating that "a rule more properly being discretionary than jurisdictional" does not bar federal review, and noting that the rule had not been "so inconsistently applied" as "to amount to a self-denial of the *power* to entertain the federal claim." *Id.* at 233-34 (emphasis in original). Again, in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), where a state court refused to review issues raised for the first time on rehearing, this Court noted that the state courts had previously considered the merits

of such issues and concluded that the state court's denial of rehearing "must have rested either upon a substantive rejection of petitioner's federal claim or upon a procedural rule that the state court applies only irregularly." *Id.* at 264-65. Since the state court did not apply the rule "evenhandedly to all similar claims," *id.* at 262, this Court found the rule inadequate.

The Court adhered to the arbitrariness principle in *James v. Kentucky*, 466 U.S. 341 (1984). The issue in *James* was the trial court's failure to instruct the jury that no adverse inference could be drawn from the defendant's failure to testify. The defendant had in fact asked for an "admonition," which the trial court denied. On appeal, the Kentucky Supreme Court conceded that the Constitution required that an instruction be given, but noted that the defendant had asked for an admonition instead of an instruction. The state's highest court held that the defendant "was entitled to the instruction, but did not ask for it. The trial court properly denied the request for an admonition." *James v. Commonwealth*, 647 S.W.2d 794, 795-96 (Ky. 1983).

This Court held that the procedural default rule was inadequate because of its arbitrary application. The Court based its decision on a review of state law that revealed that the state law "distinction between admonitions and instructions is not always clear or closely hewn to." 466 U.S. at 346. The Court held that a state procedural rule applied in an arbitrary manner is not adequate.

> The question is whether counsel's passing reference to 'an admonition' is a fatal procedural default under Kentucky law adequate to support the result below and to prevent us from considering petitioner's constitutional claim. In light of the state-law background described above, we hold that it is not. Kentucky's distinction between admonitions and instructions is *not the sort of firmly established and regularly fol-*

> *lowed state practice that can prevent implementation of federal constitutional rights.*

Id. at 348-49 (emphasis added).

The Court reaffirmed the arbitrariness principle most recently in *Johnson v. Mississippi*, 108 S. Ct. ——, No. 87-6488 (U.S. June 13, 1988). The Mississippi Supreme Court in *Johnson* procedurally barred a post-conviction claim for failure to raise the issue on direct appeal. This Court, quoting *Hathorn* and *Barr*, reiterated that a "state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Johnson*, slip op. at 8. The Court found "no evidence" that the procedural bar relied upon by the Mississippi Supreme Court had been "consistently or regularly applied." *Id.*

The discretion standard and the arbitrariness standard are consistent with and supported by the universally recognized principles underlying the adequate and independent state ground doctrine. Both rules help to ensure against state court evasion of the enforcement of federal rights. The Court has long held that a state procedural default rule used to evade the enforcement of federal rights is inadequate and, by extension, that certain uses of state procedural default rules—though not evidencing an intent to evade—must be found inadequate to guard against undetectable evasion.

The Court has repeatedly noted the significance of the evasion principle. *E.g.*, *Nickel v. Cole*, 256 U.S. 222, 225 (1921); *Vandalia R.R. v. Indiana ex rel. South Bend*, 207 U.S. 359, 367 (1907); *Leathe v. Thomas*, 207 U.S. 93 (1907). The principle does not and cannot mean, however, that federal courts must inquire into whether state courts are applying their procedural rules with an actual intent to evade the enforcement of federal rights. Such an inquiry would undercut any semblance of federalism. "Few doctrines would be more destructive of harmonious relationships between federal and state ju-

diciaries than one which requires the Supreme Court to inquire into the good faith of state judges." Sandalow, *Henry v. Mississippi and the Adequate State Ground*, 1965. Sup. Ct. Rev. 187, 220 n.141. Further, the analytical tools available to the federal courts make such inquiry practically impossible as well as unseemly. *Id.* at 220.

Accordingly, the Court has adopted tests that provide objective standards for the protection of federal rights. The discretion principle and the arbitrariness principle are two such tests. Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 985 n.182 (1965).

IV. FLORIDA'S RULE AGAINST COLLATERAL CONSIDERATION OF CAPITAL SENTENCING ERRORS NOT RAISED ON DIRECT APPEAL IS A DISCRETIONARY RULE, AND THE RULE IS APPLIED IN A HAPHAZARD AND ARBITRARY MANNER THAT DEPRIVES IT OF ENFORCEABILITY FOR PURPOSES OF *WAINWRIGHT v. SYKES*

The Florida Supreme Court exercises broad discretion to enforce or forgive procedural defaults in capital cases. That discretion is not limited in Florida by principles of law. Although the Florida Supreme Court sometimes declines to reach the merits of capital sentencing issues raised in collateral proceedings on the ground that issues should have been raised on direct appeal, that same court at other times reaches the merits of identical issues in identical circumstances of default.

A. Florida's Default Rules are Discretionary

The Florida Supreme Court has broad—apparently unlimited—discretion to enforce or excuse procedural defaults in capital cases. The former Fifth Circuit half a decade ago observed that "established [Florida] law" provides that "in death cases, the Florida Supreme Court exercises a special scope of review enabling it to excuse procedural defaults." *Henry v. Wainwright*, 686 F.2d

311, 314 (5th Cir. 1982) (Unit B), *vacated for reconsideration on other grounds*, 463 U.S. 1223 (1983).

Florida Rule of Appellate Procedure 9.140(b) provides that the Florida Supreme Court's "Scope of Review" is as follows:

> The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the Court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

The Florida Supreme Court has used its discretion to forgive trial level defaults. In *Elledge v. State*, 346 So. 2d 998 (Fla. 1977), for example, the court noted that although certain testimony "was not objected to by appellant's trial counsel," that "should not be conclusive of the special scope of review by this Court in death cases." *Id.* at 1002.

The Florida Supreme Court also possesses discretion to forgive defaults on direct appeal. In *Davis v. State*, 461 So.2d 67 (Fla. 1984), the Florida Supreme Court reaffirmed the wide scope of its review in capital cases and made clear that under state law the court possesses the discretion to consider capital sentencing issues on direct appeal, even if the appellant's lawyer explicitly waives such consideration. The court's opinion explained that Davis' appellate attorney did not challenge the death sentence. In response to questioning at oral argument in the Florida Supreme Court, defense counsel stated that he made a tactical choice not to raise sentencing issues and gave several strategic reasons for his considered decision to deliberately waive any sentencing issues. The Florida Supreme Court held, however, that Florida's capital statute "directs [the Florida Supreme] Court to review both the conviction and sentence in a death

case, and we will do so here on our own motion." *Id.* at 71. The court then went on to hold that one aggravating circumstance had been improperly found by the sentencing judge. When the case returned to the Florida Supreme Court on collateral review, the court affirmed the denial of post-conviction relief and observed that it had previously reviewed the imposition of the death sentence "on our own as statute [sic] requires that we do." *Davis v. Wainwright*, 498 So.2d 857, 858 (Fla. 1986).

In *Jacobs v. State*, 396 So.2d 713, 717 (Fla. 1981), the Florida Supreme Court was "not favored with any help from either counsel on the issue of the imposition of the death penalty," but still "we must review the propriety of the death sentence." Upon doing so, the court vacated the death sentence in *Jacobs*. *Cf. Martin v. State*, 420 So.2d 583, 585 (Fla. 1982) (noting scope of review in capital cases); *Armstrong v. State*, 429 So.2d 287, 289 (Fla. 1983) (same).

Perhaps the most extraordinary example of the Florida Supreme Court's power and willingness to reach out to decide defaulted capital sentencing claims is *Rose v. State*, 425 So.2d 521 (Fla. 1982), where the court first established that a six-to-six jury sentencing recommendation should be treated as a life recommendation rather than as a hung jury. There, the sentencing jury, after deliberating for some time, advised the court that they were tied six-to-six and that no jurors would change their minds; the jury requested further instructions. The judge responded by giving a jury deadlock charge, and the jury responded shortly thereafter by returning a seven-to-five recommendation of death. The Florida Supreme Court reversed the death sentence and remanded for resentencing, holding that the proper action for the trial judge to have taken when confronted with the jury's request for further instructions would have been to instruct the jury that it was not necessary to have a majority reach a sentencing recommendation of life im-

prisonment, because "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." *Id.* at 525. Yet this was an issue raised neither at trial, nor in the appellate briefs or at oral argument before the Florida Supreme Court, where all parties agreed that a six-to-six vote was a hung jury.

Thus, the Florida Supreme Court possesses under state law the discretion to enforce procedural defaults or to forgive them. That court's "discretionary decision to deny" consideration of a federal claim, *Williams*, 349 U.S. at 389, is an "act so arbitrary and so cruel, considering that life is at stake," *Daniels v. Allen*, 344 U.S. at 557 (Frankfurter, J., dissenting), that it is entitled to no deference under *Sykes*.

B. Florida's "Raised or Could Have Been Raised on Direct Appeal" Rule is Haphazardly Applied

The Florida Supreme Court's broad direct review discretion to decide defaulted claims of condemned inmates extends to issues brought for the first time in state post-conviction proceedings. While the Florida Supreme Court sometimes declines to reach the merits of claims raised for the first time in post-conviction proceedings, that court at other times decides the merits of identical issues in identical situations. Its cases demonstrate the haphazard application of Florida's "raised or could have been raised on direct appeal" rule in capital cases.

In *Stone v. State*, 481 So.2d 478 (Fla. 1985) and *Booker v. State*, 441 So.2d 148 (Fla. 1983), the Florida Supreme Court barred post-conviction claims that Florida applies its death penalty system in a racially discriminatory manner—the substantive issue subsequently addressed by this Court in *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987).[4] In *Stone*, the Florida Supreme Court held

[4] In *Stone* and *Booker*, as well as in other cases discussed below, it is not apparent from the face of the Florida Supreme Court's

that the discrimination issue either "[was] or could have been raised on direct appeal" and therefore was not a "proper matter[] to be considered" in a post-conviction proceeding. 481 So.2d at 479. In *Booker*, the court also deemed the petitioner to be procedurally barred from raising this discrimination issue for the first time in a post-conviction proceeding because this claim "could have been raised on direct appeal." 441 So.2d at 150. Yet as early as 1979—four years before it decided *Booker* and six years before it decided *Stone*—the Florida Supreme Court had held that the identical discrimination claim "can properly be raised . . . in a proceeding for post-conviction relief." *Henry v. State*, 377 So.2d 692, 695 (Fla. 1979). Consistent with *Henry*—and inconsistent with *Booker* and *Stone*—are *Meeks v. State*, 382 So.2d 673 (Fla. 1980) and *Smith v. State*, 457 So.2d 1380 (Fla. 1984). The court in *Meeks* and *Smith* held that claims of systemic racial discrimination are cognizable in post-conviction proceedings. *Smith*, 457 So.2d at 1381; *Meeks*, 382 So.2d at 675. Most recently, in *Stewart v. State*, 495 So.2d 164 (Fla. 1986), the court said, without reference to *Stone* or *Booker*, that "since *Henry v. State* we have held that the [discrimination] claim is cognizable" in a post-conviction proceeding; as of 1984, the issue "had been found to be cognizable for at least six years." 495 So.2d at 165 (citation omitted). Thus, in 1979 and 1980 the Florida Supreme Court held that the discrimination claim *could* be brought in a post-conviction proceeding (*Henry* and *Meeks*); in 1983 the

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opinions that racial discrimination was the underlying merits issue. The court's opinion in *Stone* framed the underlying merits issue in terms of "unconstitutionality of the Florida death penalty as applied," while the court's opinion in *Booker* characterized the issue as a challenge to the "arbitrariness of Florida's death penalty." *Stone*, 481 So.2d at 479; *Booker*, 441 So.2d at 151. But the pleadings filed in these two cases, as well as in other cases discussed below, make clear that systemic discrimination was in fact the substantive issue presented in these cases. Such pleadings are available from the Florida Supreme Court or from undersigned counsel.

court held that the claim could *not* be brought in a post-conviction proceeding (*Booker*); in 1984 the court held that it *could* be (*Smith*); in 1985 the court held that it could *not* be (*Stone*); and in 1986 the court held that it *could* be (*Stewart*).

Similarly, in *Ford v. State*, 407 So.2d 907, 908 (Fla. 1981), *Thomas v. State*, 421 So.2d 160, 162 (Fla. 1982), and *Funchess v. State*, 449 So.2d 1283, 1284 (Fla. 1984), the Florida Supreme Court held that challenges to penalty phase jury instructions could not be raised in state post-conviction proceedings because the claims should have been raised on direct appeal. Neither Ford, Thomas nor Funchess objected to the instructions at trial; they did not attack the instructions on direct appeal; they challenged the instructions for the first time in state post-conviction proceedings, and the Florida Supreme Court in each case found the claims to be in procedural default for that reason. However, in *Riley v. State*, 433 So.2d 976, 978-79 (Fla. 1983), and *Straight v. Wainwright*, 422 So.2d 827, 831 (Fla. 1982), the Florida Supreme Court—without discussion of procedural default—reached the merits of post-conviction challenges to jury instructions. Like Ford, Thomas and Funchess, Riley and Straight did not object to the jury instructions at trial and did not challenge them on direct appeal. But unlike its dispositions in *Ford*, *Thomas* and *Funchess*, the Florida Supreme Court in *Riley* and *Straight* decided the merits of the instructional claims. Thus, in 1981 the Florida Supreme Court held that instructional claims could not be brought in post-conviction proceedings (*Ford*); the next year the court in September held that such claims could be raised in post-conviction (*Straight*), but in October held that they could not be (*Thomas*); the following year the court held that the claims could be raised in post-conviction proceedings (*Riley*), but the year after that the court held that they could not be (*Funchess*).

Other examples abound. In *Funchess v. State*, 449 So.2d 1283, 1284 (Fla. 1984), the petitioner was barred

from raising in post-conviction a claim that the death penalty was inappropriate in his case because he had not been convicted of premeditated murder; the court found that the claim should have been raised on direct appeal. However, in *Hall v. State*, 420 So.2d 872, 874 (Fla. 1982), the court addressed the merits of an identical claim without reference to procedural default. As in *Funchess*, the petitioner in *Hall* had not raised the issue at trial or on direct appeal.

In *Goode v. State*, 403 So.2d 931, 932 (Fla. 1981), the court barred a post-conviction claim that the trial court had improperly relied upon an invalid aggravating circumstance. Yet in *Demps v. State*, 416 So.2d 808, 809 (Fla. 1982), the court in post-conviction proceedings reached the merits of the claim of use of invalid aggravating circumstances. The *Demps* court did not discuss the procedural bar as to this issue, despite an earlier discussion of the bar as to other claims in the case. *Id.* at 809. Again, in *Ruffin v. State*, 420 So.2d 591, 592 (Fla. 1982), the court decided the merits of a post-conviction claim that an aggravating circumstance was improperly found without discussion of procedural default. Thus, the claim was deemed barred in 1981 in *Goode*, and cognizable one year later in *Demps* and *Ruffin*.

Finally, in *Messer v. State*, 439 So.2d 875, 879 (Fla. 1983) the court refused to consider a state habeas petitioner's argument that due process entitled him to explicit proportionality review by the Florida Supreme Court. Yet five weeks after its decision in *Messer*, the court in *Booker v. State*, 441 So.2d 148, 153 (Fla. 1983), reached out and decided the merits of this claim in a state habeas case.

These examples demonstrate that Florida has no consistently applied rule barring consideration of issues raised in collateral proceedings that could have been raised on direct appeal, at least in cases raising capital

sentencing issues. A discretionary procedural rule applied in such a haphazard, arbitrary fashion does not satisfy the adequate and independent state ground test. Therefore the State's invocation of this rule in Mr. Adams' case does not trigger a *Wainwright v. Sykes* limitation of federal habeas corpus review.

CONCLUSION

Florida applies its discretionary rule against collateral consideration of capital sentencing errors not raised on direct appeal in a haphazard and arbitrary manner that deprives it of effect under *Wainwright v. Sykes.*

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Date: July 1, 1988

** Counsel gratefully acknowledge the valuable assistance of Judith Dillon and James Moreno, law students at Vermont Law School, in the preparation of this brief.